FILED
FEB 9 1990
JOSEPH F. SPANIOL, JR.
CLERK

89-1309

CASE NO.: _____

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1989

RICHARD H. THIER,

Petitioner/Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent/Appellee

JURISDICTIONAL STATEMENT

ALVIN E. ENTIN, ESQ.
Entin, Schwartz, Margules
And Lazarus
2450 N.E. Miami Gardens Drive
Second Floor
Miami, Florida 33180
(305) 932-0550

Counsel for the Petitioner

QUESTIONS PRESENTED FOR REVIEW

1.

WHETHER THE RULING BY THE FIFTH CIRCUIT COURT OF APPEALS IN THE INSTANT CASE THAT THE GOVERNMENT DID NOT VIOLATE ITS PLEA AGREEMENT WITH THE Petitioner CONFLICTS WITH THAT OF THE SECOND CIRCUIT COURT OF APPEALS IN UNITED STATES V. CORSENTINO, 685 F.2D 48 (2D CIR.1982), AND IN UNITED STATES V. CARBONE, 739 F.2D 45 (2D CIR.1986), AND FURTHER CONFLICTS WITH THE DECISION OF THE THIRD CIRCUIT COURT OF APPEALS IN UNITED STATES V. CRUSCO, 536 F.2D 21 (3D CIR.1976), AND THE EIGHTH CIRCUIT COURT OF APPEALS IN UNITED STATES V. MCCRAY, 849 F.2D 304 (8TH CIR.1988).

2.

WHETHER THE IMPOSITION BY THE TRIAL COURT OF CONSECUTIVE SENTENCES VIOLATED THIS COURT'S HOLDING IN BLOCKBURGER V. UNITED STATES, 284 U.S. 299, 53 S.CT. 180, 76 L.ED.2D 306 (1932), AND THE HOLDING OF THE NINTH CIRCUIT COURT OF APPEALS IN UNITED STATES V. ANDERSSON, 813 F.2D 1450 (9TH CIR.1987).

LIST OF INTERESTED PARTIES

TRIAL JUDGE	John M. Duhe, Jr.
PETITIONER	Richard H. Thier
UNITED STATES OF AMERICA	Judith A. Lombardino Assistant United States Attorney
ATTORNEY FOR PETITIONER	Alvin E. Entin, Esq. Entin, Schwartz, Margules & Lazarus
ALLEGED VICTIMS	None

TABLE OF CONTENTS

	Page
Opinion Below	2
Jurisdiction	3
Statutes, and Regulations Involved	4
Statement of the Case	7
Argument	12
Conclusion	22
Proof of Service	23

TABLE OF AUTHORITIES

Cases	Page
Blockburger v. United States 284 U.S. 299, 52 S.Ct. 180 76 L.Ed. 306 (1932)	19-20
United States v. Andersson 813 F.2d 1450 (9th Cir.1987) .	20
United States v. Carbone 739 F.2D 45 (2D CIR.1986) . .	16-17
United States v. Corsentino 685 F.2d 48 (2d Cir.1982) . .	15-18
United States v. McCray 849 F.2d 304 (8th Cir.1988) .	17-18
United States v. Piccolo 696 F.2d 1162 (7th Cir.1983) .	20
United States v. Santobello 404 U.S. 257, 30 L.Ed.2d 427 92 S.Ct. 495 (1971)	13-15

CASE NO.: _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

RICHARD H. THIER,

Petitioner/Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent/Appellee

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH JUDICIAL CIRCUIT

The Petitioner, RICHARD H. THIER, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Judgment and Commitment Order of the District Court is reprinted herein. (A 1-7). The opinion of the Court of Appeals for the Fifth Circuit affirming the Judgment of the District Court in United States v. Thier, Case No. 88-4811, 5th Cir.1989), was rendered on October 26th, 1989, and is reprinted herein. (A 8-35). The Petitioners' timely-filed Petition for Rehearing was denied by the Court on December 11th, 1989. (A 36-37).

STATEMENT OF JURISDICTIONAL GROUNDS

This Petition arose in the first instance from criminal charges filed in the District Court for the Western District of Louisiana. The Judgment and Commitment Order rendered by the Court was appealed to the United States Court of Appeals for the Fifth Circuit pursuant to the jurisdiction vested in the Court by 28 U.S.C. 1291.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. 1254.

STATUTES AND REGULATIONS INVOLVED

18 U.S.C. 371

If two or more persons conspire either to commit an offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Title 18 U.S.C. § 841(a)(1)

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally-

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . .

Title 18 U.S.C. § 4505

(a) Whenever confined and serving a definite term or terms of more than one

year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serving ten years of a life sentence or of a sentence of over thirty years, except to the extent otherwise provided by law.

(b) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the

prisoner may be released on parole at such time as the Commission may determine.

21 U.S.C. 952(a)

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of Subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of Subchapter I of this chapter . . . .

STATEMENT OF THE CASE

On December 3, 1984, the Petitioner, RICHARD H. THIER, and twenty two co-defendants were indicted by a Federal grand jury sitting in the Western District of Louisiana. The indictment contained 18 counts. THIER was charged in Count I with conducting a continuing criminal enterprise in violation of 21 U.S.C. § 848, in Count II with conspiracy to import marijuana in violation of 21 U.S.C. § 952(a) and 963, in Count III with conspiracy to possess with intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1), 841(b)(6), and 846, in Counts IV and XVIII with distribution of marijuana in violation of 21 U.S.C. § 841(a)(1), 841(b)(6), and 846, in Counts XIV and XVII with possession of marijuana with intent to distribute in violation of 21 U.S.C. § 955a(a), in Count XV with possession of marijuana with intent to

import it into the United States in violation of 21 U.S.C. § 955a(d), and in Count XVI with importation of marijuana in violation of 21 U.S.C. § 952a.

THIER entered into negotiations with the government which culminated in the execution of a plea agreement on January 8, 1987. (A 38-47). Pursuant to the terms of plea agreement, the indictment filed against the Petitioner was ultimately dismissed, and the Petitioner pleaded guilty to a four count Bill of Information filed on August 7, 1987. (A 48-54).

The Bill of Information charged the Petitioner in Count I with conspiracy to defraud the United States of income tax monies in violation of 18 U.S.C. 371, in Count II with importation of marijuana in violation of 21 U.C.A. § 952(a), in Count III with possession of marijuana with intent to distribute, in violation of 21

U.S.C. § 841(a)(1), and in Count IV with distribution of marijuana in violation of 21 U.S.C. § 841(a)(1).

The Petitioner was sentenced by the Court on October 21, 1988.

Contrary to the agreement entered into between Mr. THIER and the government, the government made recommendations and objections which affected the duration and severity of the Petitioner's sentence. Specifically, the Petitioner's request that he be sentenced pursuant to 18 U.S.C.A. § 4205(b)(2) was opposed by the government, as was his request that the Court recommend that his term of incarceration be served in a level 1 (minimum security) facility.

An Amended Judgment and Commitment Order was rendered by the Court on January 25, 1989. (A 1-7). The Petitioner was sentenced to the maximum term possible under the plea agreement. The sentence

was rendered pursuant to 18 U.S.C. § 4205(a), rather than 18 U.S.C. § 4205(b)(2), which adversely affected his parole eligibility. The Court did not recommend his placement in a level 1 institution. Mr. THIER received consecutive five-year sentences on each count of the Bill of Information, even though Count III of the Information, possession of marijuana with intent to distribute, and Count IV, distribution of marijuana, constituted a single transaction.

The Petitioner's Notice of Appeal to the United States Circuit Court for the Fifth Circuit was timely-filed on November 2, 1988. (A 55-56). The Fifth Circuit affirmed the trial court's judgment and sentence on October 26th, 1989. (A 8-35). The Petitioner filed a Motion for Rehearing and Suggestion for Rehearing In Banc on November 7th, 1989. Subsequently,

a Revised Petition for Rehearing was filed, deleting the request for en banc consideration. (A 57-61). It was denied by the Court on December 11, 1989. (A 36-37).

ARGUMENT

1.

WHETHER THE RULING BY THE FIFTH CIRCUIT COURT OF APPEALS IN THE INSTANT CASE THAT THE GOVERNMENT DID NOT VIOLATE ITS PLEA AGREEMENT WITH THE PETITIONER CONFLICTS WITH THAT OF THE SECOND CIRCUIT COURT OF APPEALS IN UNITED STATES V. CORSENTINO, 685 F.2D 48 (2D CIR.1982), AND IN UNITED STATES V. CARBONE, 739 F.2D 45 (2D CIR.1986), AND FURTHER CONFLICTS WITH THE DECISION OF THE THIRD CIRCUIT COURT OF APPEALS IN UNITED STATES V. CRUSCO, 536 F.2D 21 (3D CIR.1976), AND THE EIGHTH CIRCUIT COURT OF APPEALS IN UNITED STATES V. MCCRAY, 849 F.2D 304 (8TH CIR.1988).

In the Plea Agreement entered into by and between the Petitioner and the United States, the government agreed that:

> The United States also agrees that it will not take a position as to what the actual term of imprisonment in this matter should be. (A 44).

Nevertheless, at the sentencing of the Petitioner, when the Court was requested to sentence the Petitioner pursuant to Title 18 U.S.C. § 4205(b)(2), as opposed to Title 18 U.S.C. § 4205(a), and requested a recommendation to the Bureau of Prisons that Mr. THIER be designated to

a Level I (prison camp) institution, the government, in violation of its agreement with the Petitioner, objected, stating:

> **MS. LOMBARDINO:** Your honor, as to those requests, in particular, the Security Level I facility, the United States would object for the reason that we would not want to tell the Bureau of Prisons what level of security this defendant should be, if he should be sentenced to a term of imprisonment. We have no problems with this Court making a recommendation that he be incarcerated, if that should occur, in a facility near his family.
>
> As to the 4205(b)(2) sentence, Your Honor, this Court has consistently throughout these proceedings and other proceedings sentenced all defendants under 18 U.S.C. 4205(a) and the United States does not see any reason for deviating at this time from that practice.

The seminal case involving broken promises of the government, which had been solemnly given to a defendant in order to induce him to plead guilty, is United States v. Santobello, 404 U.S. 257, 30 L.Ed.2d 427, 92 S.Ct. 495 (1971). Santobello was indicted on two State

felony counts under New York statutes. After negotiating a plea through his attorney, he withdrew his not guilty plea, and entered a guilty plea to a lesser charge. The prosecution agreed to make no recommendation as to the sentence to be imposed.

At the sentencing, a prosecutor who had not been involved in the plea negotiations appeared, and recommended the maximum sentence. Despite the objections of Santabello's attorney, the Court sentenced Santobello to the maximum sentence. Even though the trial court judge announced that he was not influenced by the prosecutor's recommendation,[1] and was

[1] The trial judge stated (as cited in the opinion of the Supreme Court at 30 L.Ed.2d 431):

> Mr. Aronson [Defense Counsel], I am not at all influenced by what the District Attorney says, so that there is no need to adjourn the sentence, and there is no need to have any testimony. It doesn't make a particle of difference what the District

influenced solely by the probation report, the United States Supreme Court reversed, stating (at 30 L.Ed.2d 433):

> . . . when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

Several circuits have found the conduct engaged in by the government in the instant case to require reversal or resentencing. These decisions directly conflict with the decision of the Fifth Circuit in the instant case.

For instance, in United States v. Corsentino, 685 F.2d 48 (2d Cir.1982), the government promised to take "no position" at sentencing. When the government at sentencing expressed opposition to the sentencing of Corsentino under § 4205(b)(2), the Defendant raised no

> Attorney says he will do, or what he doesn't do.

objection. Nevertheless, the Second Circuit vacated the Defendant's sentence, and remanded for resentencing before a different judge. id. 685 F.2d at 52.

As in the instant case, the government argued on appeal that its promise to "take no position" did not encompass its opposition to the sentence consideration requested by the Petitioner herein. But the court in Corsentino found that:

> . . . a plausible interpretation is that once the issue of guilt had been resolved by entry of a plea, the Government would make no comment to the sentencing judge, either orally at sentencing or in writing prior to sentencing, that bears in any way upon the type or severity of the sentence to be imposed. (Emphasis supplied).

In United States v. Carbone, 739 F.2d 45 (2d Cir.1984), the Court considered a closely analogous factual situation. In Carbone, the government entered into a plea agreement with the defendant, in which it agreed that it would, "make no recommendation to the sentencing judge as

to the sentence which Stephen Carbone may be given . . . ."

The Court sentenced Carbone to serve thirty (30) months imprisonment. The defendant then requested a "split sentence" under Title 18 U.S.C. § 3651, under which Carbone would serve at most six months in prison, with the rest of the sentence being suspended. The prosecutor strenuously objected.

The Second Circuit reversed and remanded for sentencing before a different judge, citing Corsentino, supra. The Court ruled that the most plausible interpretation of the government's promise was that it covered the entire sentencing hearing. Even though sentence had already been imposed, the Court stated (739 F.2d at 47):

> If the government had wished to limit its promise solely to the portion of the sentencing hearing prior to the judge's initial statement of his inclination as to sentence, it should

have stated so explicitly.

The Eighth Circuit was confronted with exactly the same factual situation extant in the case at bar in United States v. McCray, 849 F.2d 304 (8th Cir.1988). In McCray, the Defendant signed a plea agreement with the United States in which the government agreed to make no recommendation as to sentence. Despite that promise, at the defendant's sentencing, the government opposed a defense request for early parole consideration pursuant to Title 18 U.S.C. § 4205(b)(1).

Citing United States v. Carbone, and United States v. Corsentino, supra., the Court vacated the defendant's sentence and remanded for resentencing before a different judge. The Court further indicated that it was irrelevant whether the trial court was influenced or not by the government's opposition. The breach

of the plea agreement required resentencing. McCray, supra., 849 F.2d at 305.

2.

WHETHER THE IMPOSITION BY THE TRIAL COURT OF CONSECUTIVE SENTENCES VIOLATED THIS COURT'S HOLDING IN BLOCKBURGER V. UNITED STATES, 284 U.S. 299, 53 S.CT. 180, 76 L.ED.2D 306 (1932), AND THE RULING OF THE NINTH CIRCUIT COURT OF APPEALS IN UNITED STATES V. ANDERSSON, 813 F.2D 1450 (9TH CIR.1987).

In Counts III and IV of the Bill of Information, the Defendant was charged with possessing approximately 19,000 pounds of marijuana with the intent to distribute it, and with distributing the same marijuana, all on or about december 2, 1979. This Court has long abided by the tenet that, if the evidence relates to a single transaction, the Defendant cannot be sentenced separately for both offenses. Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

In Blockburger, this Court stated:

> The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not. Accord, Gore v. United States, 3576 U.S. 386, 78 S.Ct. 1280, 2 L.Ed.2d 1405 (1959).

The decision of the Fifth Circuit also is in direct conflict with United States v. Andersson, 813 F.2d 1450 (9th Cir.1987). In Andersson, the Court vacated the defendant's sentence for violation of the Blockburger rule, where the defendant had been convicted and given separate sentences for possession of cocaine with intent to distribute, and distribution of cocaine.

The same result, and the same conclusion were reached by the Seventh Circuit Court of Appeals in United States v. Piccolo, 696 F.2d 1162 (7th Cir.1983).

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be granted, the sentences imposed by the district court vacated, and the case remanded for resentencing before a different judge.

Respectfully Submitted,

ALVIN E. ENTIN, ESQ.
ENTIN, SCHWARTZ,
MARGULES & LAZARUS
2450 N.E. Miami Gardens Drive
Second Floor
(305) 932-0550

PROOF OF SERVICE

COMES NOW, Alvin E. Entin, Esq., on behalf of the Petitioner, RICHARD H. THIER, and states to this Court:

1) That on February , 1990, the attached Writ of Certiorari submitted on behalf of the Petitioner was mailed at the United States Post Office, Miami, Florida.

2) I certify that a true and accurate copy of the foregoing Writ of Certiorari has been furnished to Judith A. Lombardino, Assistant United States Attorney, 500 Fannin Street, Shreveport, Louisiana 71101.

3) Said statement is being submitted to this Court pursuant to Rule 28.2 of the Rules of the Supreme Court.

Respectfully submitted,

ENTIN, SCHWARTZ, MARGULES & LAZARUS
2450 N.E. MIAMI GARDENS DRIVE
SECOND FLOOR
MIAMI, FLORIDA 33180
(305) 932-0550

_____
ALVIN E. ENTIN, ESQ.

SWORN TO AND SUBSCRIBED before me this

____ day of February, 1990.

_____
NOTARY PUBLIC, STATE OF FLORIDA

My commission expires: